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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

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No. 802

C. C. PEYTON, Superintendent of the Virginia State Penitentiary,
Petitioner,

vs.

ROBERT ELMER ROWE,
Respondent.

C. C. PEYTON, Superintendent of the Virginia State Penitentiary,
Petitioner,

vs.

CLYDE MASON THACKER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA, AMICUS CURIAE

THOMAS C. LYNCH
Attorney General of the State of California
EDWARD P. O'BRIEN
Deputy Attorney General of the State of California
DERALD E. GRANBERG
Deputy Attorney General of the State of California
CLIFFORD K. THOMPSON, JR.
Deputy Attorney General of the State of California
6000 State Building
San Francisco, California 94102

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INTEREST OF AMICUS CURIAE

The opinion below is the most recent of a series of decisions by the Fourth Circuit discarding the firmly established concepts limiting the scope of federal habeas review as announced by this Court in *McNally v. Hill,* 293 U.S. 136 (1934). *McNally* holds that a federal prisoner cannot attack on habeas corpus a sentence which he is not then serving. *McNally* also holds that habeas is not available to secure a judicial decision on a question which, even if determined in the petitioner's favor, will not result in his immediate release.

California's state prison and parolee population exceeds 36,750. Were *McNally* now to be overturned by this Court, some 45% of this number, imprisoned under consecutive or concurrent sentences, would be invited to petition for writs of habeas corpus to secure advisory opinions from federal district courts respecting the validity of state court convictions which are now beyond challenge. Our interest in upholding judgments rendered by our state courts and in avoiding superfluous litigation brings the People of the State of California before this Honorable Court as *amicus curiae.*

SUMMARY OF ARGUMENT

This case is controlled by *McNally v. Hill,* 293 U.S. 136 (1934), and subsequent decisions of the Court reaffirming the principle that the writ of habeas corpus is available only to attack a sentence presently being served, and only when a successful attack will accomplish immediate release.

The decision below radically departs from the common law tradition of the writ. As recently as 1959, in *Heflin v. United States,* 358 U.S. 415 (1959), the Court, recognizing the continued vitality of that tradition applied the custodial requirement announced in *McNally* to the federal resentencing statute, 28 U.S.C. § 2255.

The Supreme Court has always recognized that Congress has full authority to regulate the scope and procedure of the writ. Congress has exercised that power in 28 U.S.C. § 2241, imposing a requirement that a petitioner must be presently held in custody under the sentence which he would attack. The decision below denies the language of the statute its long-accepted and intended meaning.

McNally is founded upon sound public policies: federal nonintervention into the orderly administration of justice by the states; avoidance of premature constitutional claims on grounds of nonjusticiability; reduction of the burden upon the federal courts by elimination of claims which may never need to be heard and which may require opinions which are advisory.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT EXPLICITLY REJECTS THE CONTROLLING PRECEDENT OF THIS COURT, IS CONTRARY TO NUMEROUS OTHER DECISIONS BY THIS COURT, ABANDONS THE HISTORIC COMMON LAW CONCEPT OF THE WRIT OF HABEAS CORPUS, EXCEEDS THE JURISDICTION CONFERRED BY THE CONTROLLING STATUTE AND IS CONTRARY TO SOUND PUBLIC POLICY. THE DECISION BELOW SHOULD BE REVERSED.

A. The decision rendered by the Court of Appeals for the Fourth Circuit explicitly rejects McNally v. Hill, the controlling precedent of this Court.

This is, of course, not a case of first impression. The precise question was before this Court in *McNally v. Hill,* 293 U.S. 136 (1934). There a federal prisoner sought to attack collaterally a consecutive sentence which he had not begun to serve. McNally urged that if he could overturn his future sentence he would be eligible for parole on his current term. The Court held that the writ of habeas corpus was not available for his purpose.

> "Such use of the writ in the federal courts is without the support of history or of any language in the statutes. . . . Without restraint of liberty, the writ will not issue. . . . A sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry." *Id.* at 138.

McNally was reaffirmed in *Holiday v. Johnston,* 313 U.S. 342 (1941), in *Darr v. Burford,* 339 U.S. 200, 203 (1950), in *Parker v. Ellis,* 362 U.S. 574, 575 (1960), and most recently in *Fay v. Noia,* 372 U.S. 391, 427 n. 38 (1963).

The decisions of the United States Courts of Appeals, save for the Fourth Circuit, witness the present vitality of the *McNally* doctrine. *McNally* has been followed by the First Circuit, *Allen v. United States,* 349 F.2d 362 (1st Cir. 1965), the Second Circuit, *United States ex rel. Smith v. Martin,* 239 F.2d 530 (2d Cir. 1956), *United States v. McGann,* 245 F.2d 670 (2d Cir. 1957), the Third Circuit, *Palumbo v. New Jersey,* 334 F.2d 524 (3d Cir. 1964), the Fifth Circuit, *Brown v. Beto,* 377 F.2d 950 (5th Cir. 1967), *Young v. United States,* 337 F.2d 753 (5th Cir. 1964), the Sixth Circuit, *Lowther v. Maxwell,* 347 F.2d 941 (6th Cir.), *cert. denied,* 382 U.S. 881 (1965), the Seventh Circuit, *Postelwait v. Markley,* 342 F.2d 677 (7th Cir. 1965), the Eighth Circuit, *Burnside v. Nebraska,* 378 F.2d 915 (8th Cir. 1967), the Ninth Circuit, *Barquera v. California,* 374 F.2d 177 (9th Cir. 1967), *Crow v. United States,* 186 F.2d 704 (9th Cir. 1950), the Tenth Circuit, *Carpenter v. Crouse,* 358 F.2d 701 (10th Cir. 1966), and by the District of Columbia, *Moon v. United States,* 272 F.2d 530 (D.C. Civ. 1959), *Thomas v. United States,* 271 F.2d 500 (D.C. Cir. 1959).

Nevertheless, unhappy with *McNally,* the Fourth Circuit has rejected it. In *Martin v. Commonwealth,* 349 F.2d 781 (4th Cir. 1965), the Fourth Circuit faced the identical issue posed in *McNally.* It held that the custodial requirement of 28 U.S.C. § 2241 was met by an allegation that the petitioner's present right to be considered for parole was barred by a conviction sought to be vacated, even though the petitioner had not begun to serve the sentence attacked.

Tucker v. Peyton, 357 F.2d 115 (4th Cir. 1966), and *Williams v. Peyton,* 372 F.2d 216 (4th Cir. 1967), marked advances demanded by *Martin. Tucker* permitted a state prisoner to attack a prior sentence fully served in order to advance his current valid recidivist sentence, although he had not served sufficient time to satisfy the concededly valid portion of the current term. If Tucker prevailed, the court said, he would be entitled to immediate release. *Williams* made federal habeas corpus available to a state prisoner already eligible for parole on a sentence which he did not challenge, but whose chances for parole were "manifestly restricted" by the fact of other convictions and unserved sentences thereon, allegedly invalid.

Rowe v. Peyton, 383 F.2d 709 (4th Cir. 1967), simply realized the potential of *Martin v. Commonwealth.* Finally, in *Rowe,* the Fourth Circuit concluded that "the writ is available to attack any sentence, service of which will be required in the future by the same custodian who presently detains the prisoner." *Id.* at 717.

Aided by its unique interpretation of *Jones v. Cunningham,* 371 U.S. 236 (1963), and *Fay v. Noia,* 372 U.S. 391 (1963), the Fourth Circuit has concluded that *McNally* no longer is the law of the land. *Rowe v. Peyton, supra,* 714. In our view, *Rowe* and its progenitors are inconsistent with numerous decisions of this Court, including those from which they would draw support.

B. The opinion of the Court of Appeals is inconsistent with other decisions of this Court.

In addition to rejecting the doctrine formulated in *McNally,* applied in *Holiday v. Johnston,* and approved in *Darr v. Burford,* in *Parker v. Ellis,* and again in *Fay v. Noia, Rowe* is inconsistent with this Court's decision in *Heflin v. United States,* 358 U.S. 415 (1959). In a footnote to its opinion the Fourth Circuit quietly concedes that this 1959 decision "may be regarded as an affirmation of *McNally v. Hill. . . .*" *Rowe v. Peyton,* 715 n. 21. The difficulty, then, is not that "Since McNally v. Hill the Supreme Court has not dealt directly with the problem . . .," *Id.* at 715, but the Fourth Circuit's belief that this Court has dealt with it incorrectly.

In 1948, Congress enacted 28 U.S.C. § 2255, authorizing federal prisoners to petition for release or resentencing. The "sole purpose" of this statute was "to minimize the difficulties encountered in habeas corpus hearings by affording the *same rights* in another and more convenient forum." *Hayman v. United States,* 342 U.S. 205, 219 (1952). (Emphasis supplied.) To proceed under section 2255, a prisoner must be "in custody." *Crow v. United States,* 186 F.2d 704 (9th Cir. 1950). See *Parker v. Ellis, supra.* The custodial requirement established in 28 U.S.C. § 2255 is identical with that in 28 U.S.C. § 2241. *Allen v. United States,* 349 F.2d 362 (1st Cir. 1965); *United States v. Bradford,* 194 F.2d 197 (2d Cir.), *cert. denied,* 343 U.S. 979 (1952).

In *Heflin* this Court held that a federal prisoner may not, under section 2255, attack a sentence which he is not serving. A majority specifically reaffirmed *McNally*. *Heflin v. United States*, 421. (Concurring opinion of Mr. Justice Stewart.)[1] *Heflin* and *McNally* stand or fall together.

Rowe and its precursors purport to find support in the Court's opinions in *Jones v. Cunningham, supra*, and in *Fay v. Noia, supra*. *Jones* and *Fay* are interpreted to signal a new era of continued growth for the Great Writ.

Jones held only that the restrictive conditions incident to parole[2] satisfy the "in custody" requirement of section 2241, so as to confer habeas corpus jurisdiction upon a district court. Parole status so greatly curtails personal freedom that parole is but an extension of the prison walls. The parolee remains in *constructive custody*. See *Hoptowit v. United States*, 274 F.2d 936 (9th Cir. 1960). Thus, in permitting a parolee to apply for the writ, this Court did not depart from the historic principle that the writ may issue only to secure the petitioner's release from custody. *Fay v. Noia, supra*.

Jones does not support *Rowe; Fay v. Noia* undermines it. *Fay*, decided after *Jones*, reminds us that

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[1]We recognize that in both *Heflin* and *McNally* federal prisoners denied relief had alternate routes to the federal courts. See *Arketa v. Wilson*, 373 F.2d 582, 584 (9th Cir. 1967). It is equally clear, however, that the Court did not rest its decisions upon this basis. Moreover, by its recent enactment of 28 U.S.C. § 2254(d), Congress has said that state courts are satisfactory forums for vindicating constitutional rights. State and federal prisoners stand on the same footing.

[2]*Id.* at 237, 241-242.

> "custody in the sense of restraint of liberty is a prerequisite to habeas, for the only remedy that can be granted on habeas is some form of discharge from custody. McNally v. Hill. . . ." *Id.* at 427, n. 38.

Rowe, fastening upon broad language in *Jones* and in *Fay,* ignores this specific statement.[3] It is plain that the Fourth Circuit has prematurely interred *McNally* and is no less anxious to dispatch *Heflin* and *Parker.* See *Cruz v. United States,* 368 F.2d 783 (4th Cir. 1966).

C. The decision of the Court of Appeals departs from the common law tradition of the writ.

Neither the Constitution nor the statute fully defines the term "habeas corpus." To ascertain its meaning and appropriate use, "recourse must be had to the common law, from which the term was drawn, and to the decisions of this Court interpreting and applying the common law principles which define its use when authorized by the statute." *McNally v. Hill, supra,* 136.

We have demonstrated that the Court of Appeals has refused to follow the controlling decisions of this Court. The Fourth Circuit frankly states that its approach also represents

> "a significant departure from the historic conception that the writ of habeas corpus was avail-

[3] *Jones* and *Fay* are easily distinguished from the Fourth Circuit's decisions on the basis of prematurity, or mootness. *Jones* and *Fay* were single sentence cases in which habeas corpus could produce immediate release from custody.

able only if the court's order would procure the immediate release of the prisoner." *Rowe v. Peyton, supra,* 715.

The Court of Appeals concluded that the passage of time has diminished the relevance of the common law as a guide for defining the scope of the writ. The extension of the writ to secure federal review of constitutional claims arising from state trials,[4] the modification of the exhaustion doctrine,[5] and recently expanded concepts of due process and equal protection work in combination with the result that our state prisons contain many inmates anxious to assert constitutional rights recognized subsequent to their convictions. The problem, according to the Fourth Circuit, is to fashion a remedy for their rights. See *Rowe v. Peyton, supra,* 713. "The problem we face simply did not exist in the Seventeenth Century," *Ibid.,* nor did it become acute until after *McNally* was decided. *Id.* at 714.

This difficulty is much alleviated by the availability of state habeas corpus and by the fact that newly cognized rights increasingly are denied retroactive application. See *Linkletter v. Walker,* 381 U.S. 618 (1965); *Tehan v. Shott,* 382 U.S. 406 (1966); *Johnson v. New Jersey,* 384 U.S. 719 (1966); *Stovall v. Denno,* 388 U.S. 293 (1967). There are, of course, sound policy reasons for retaining *McNally* even in the face of new problems. These factors we shall enumerate within. But we must first challenge the statement of

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[4]Act of Feb. 5, 1867; *Brown v. Allen,* 344 U.S. 443 (1953).

[5]*Fay v. Noia,* 372 U.S. 391 (1963).

the Court of Appeals that the *McNally* principle must be regarded as obsolete because it was not formulated in the context of present-day problems.

In 1959, in *Heflin v. United States, supra,* this Court held that a federal prisoner could not, under 28 U.S.C. § 2255, attack a sentence he was not serving. *Hayman v. United States, supra,* had previously held that section 2255 afforded federal prisoners the same rights secured to state prisoners by section 2241. *Heflin,* in effect, reaffirmed *McNally. Rowe v. Peyton, supra,* 714, n. 21.

Rights extended to defendants in state criminal trials within this decade were guaranteed in federal courts long before 1959. Compare, *e.g., Mapp v. Ohio,* 367 U.S. 643 (1961), with *Weeks v. United States,* 232 U.S. 383 (1914), and *Gideon v. Wainwright,* 372 U.S. 335 (1963), with *Johnson v. Zerbst,* 304 U.S. 458 (1938). *Heflin* thus was decided in a context precisely analogous to that of *Rowe.* The Court nevertheless adhered to the common law principle that the writ will issue only to secure the petitioner's immediate release. Whether for reasons of policy, or out of regard for the limitations of the statute, this Court has faced the problem posed in *Rowe* and concluded that the Freedom Writ, as the name implies, operates to restore immediate freedom, not to secure advisory opinions.

D. The scope of the writ is regulated by statute. One who attacks a sentence under circumstances which will not secure his immediate release is not "in custody" within the meaning of 28 U.S.C. § 2241.

28 U.S.C. § 2241 provides that

> "(c) The writ of habeas corpus shall not extend to a prisoner unless— * * * (3) He is in custody in violation of the Constitution or laws or treaties of the United States. . . ."

This Court has always recognized that Congress has full authority to regulate the scope and procedure of the writ. Article I, section 9 of the Constitution guarantees only that the common law right to the writ, as it was understood in 1789,

> "shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

The Suspension Clause is cast in negative terms. Federal courts are empowered to grant the writ only by implication of the Constitution. Therefore, as Chief Justice Marshall said,

> "[T]he power to award the writ by any of the courts of the United States, must be given by written law." *Ex parte Bollman,* 4 Cranch 75, 94 (U.S. 1807).

This Court has faithfully adhered to the view expressed in *Bollman. Ex parte McCardle,* 7 Wall. 506 (U.S. 1868); *Whitney v. Dick,* 202 U.S. 132 (1906); *Adams v. United States ex rel. McGann,* 317 U.S. 269, 273 (1942); *Darr v. Burford,* 339 U.S. 200, 210-214 (1950); *Brown v. Allen,* 344 U.S. 443, 448, 500

(1953). *Cf. Johnson v. Zerbst,* 304 U.S. 458 (1938); *Hayman v. United States,* 342 U.S. 205, 211 (1952).

As noted earlier,

> "The statute does not define the term *habeas corpus.* To ascertain its meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law, from which the term was drawn, and to the decisions of this Court interpreting and applying the common law principles which define its use *when authorized by statute." McNally v. Hill, supra,* 136. (Emphasis ours.)

The Supreme Court has looked to the common law only to supply that meaning to the terms of the statute which may fairly be said to have been intended by Congress. Contrary to the opinion of the Fourth Circuit, the writ of habeas corpus *is* a creature of statute and not the product of judicial innovation. See *Rowe v. Peyton, supra,* 715. The progress of the Great Writ from a limited jurisdictional concept to a constitutional remedy marks the judicial realization of the growth of the habeas corpus statute. Development at every stage has occurred within the limits and intendments of the existing statute.

When the Congress, in aid of the Reconstruction Acts,[6] passed the Act of February 5, 1867, it extended the scope of the writ to all cases where persons were restrained of their liberty in violation of the federal Constitution, federal laws, or federal treaties. *Frank*

[6] See 2 Warren, The Supreme Court in United States History, 464-482 (rev. ed. 1937).

v. Mangum, 327 U.S. 309 (1915). The principle that final judgments may be reopened on collateral attack was not established until 1953, in the landmark decision, *Brown v. Allen,* 344 U.S. 443 (1953). However, the holding of *Brown* was not the product of judicial innovation, but was reached under the compulsion of the habeas corpus statute. In one of two opinions written for the Court, Mr. Justice Frankfurter said of the Act of 1867,

> "It is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress. By giving the federal courts that jurisdiction, Congress has imbedded into federal legislation the historic function of habeas corpus adapted to reaching an enlarged area of claims." *Brown v. Allen, supra,* 500.

There can be no doubt that by including the words "in custody" in section 2241, Congress intended to perpetuate the common law requirement that a prisoner must be in custody under the sentence which he seeks to attack. In 1934, *McNally* held that the custodial requirement of the existing habeas corpus statute foreclosed collateral attack upon a future sentence. *McNally* was the law in 1948, when the present habeas statute was enacted. *Heflin v. United States,* decided in 1959, confirms that the 1948 enactment preserves the "in custody" requirement as it was declared in *McNally.* See *Rowe v. Peyton, supra,* 714, n. 21.

While the Fourth Circuit conceded that it was departing from the common law requirement of custody, it attempted to bring its decision into harmony with

the statute. *Rowe* held that state prisoners under consecutive terms are detained for the service of present and subsequent sentences alike and are, therefore, "in custody" under all sentences within the meaning of the statute. This, the court said, was a "reasonable interpretation of the custodial language of the statute. . . ." *Id.* at 714. We earnestly disagree.

No interpretation is reasonable which does not comport with the legislative intent. The Fourth Circuit's interpretation does not meet this requirement. *Rowe* denies the statutory language its historic and intended meaning, the meaning ascribed to it by this Court and by ten United States Courts of Appeals.

The custodial requirement of section 2241 is identical with that of section 2255. *Allen v. United States, supra; United States v. Bradford, supra.* Section 2255 makes relief available to a prisoner "in custody . . . claiming the right to be released. . . ." From this we must infer that the words "in custody" in section 2241 embrace the historic limitation upon the offices of the writ: it will issue only to secure the petitioner's release from custody. *Rowe* deletes from section 2241 the implied terms "claiming the right to be released."

These words of Mr. Justice Stewart, concurring in *Heflin v. United States,* would have provided sure guidance below:

> "I think it clear that a motion for relief under 28 U.S.C. § 2255 [here § 2241] is available to attack a sentence under which a prisoner is in custody. That is what the statute says. That is what the legislative history shows. That is what

the federal courts, faced almost daily with the statute's application have unanimously concluded. Personal notions as to the kind of a post-conviction statute that Congress might have enacted or should enact are, of course, entirely irrelevant to the inquiry." 358 U.S. 415, 420. "There is not one word to indicate any intent to alter the basic principle of habeas corpus that relief is available only to one entitled to be released from custody." *Id.* at 421.

E. This Court should once more reaffirm McNally v. Hill.

The custodial requirement of the habeas corpus statute is no mere vestige of the Great Writ; it implements vital public policies.

Federal courts traditionally have refused to tax the delicate federal-state relationship by overturning state court judgments upheld by state reviewing courts in order to render an opinion which may be advisory. See *e.g., McNally v. Hill, supra,* and *Parker v. Ellis, supra.* This reluctance becomes increasingly appropriate as more states provide forums for collateral attack.[7] Expanding concepts of due process together with the increasing invocation of the writ have opened wide the door to a conflict between state and federal authorities.[8] Thus, the policy of federal

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[7]See, *e.g., In re Chapman,* 43 Cal.2d 385, 273 P.2d 817 (1954); *People ex rel. Prosser v. Martin,* 208 Misc. 875, 148 N.Y.S.2d 472 (1952); Ore. Rev. Stats. §§138.510, 138.560, 138.570; *Simon v. Director,* 235 Md. 626, 201 A.2d 371 (1964); *Commonwealth ex rel. Stevens v. Myers,* 419 Pa. 1, 213 A.2d 613 (1965); *State v. Losieau,* ..... Neb. ....., 144 N.W.2d 435 (1966); *State ex rel. Holm v. Tahash,* 272 Minn. 466, 139 N.W.2d 161 (1965).

[8]*Cf. Darr v. Burford,* 339 U.S. 200, 219, 221 (1950), (dissenting opinion of Mr. Justice Frankfurter).

nonintervention into the orderly processes of a state's administration of criminal justice grows in significance.

With a view toward reducing increased tensions placed upon federal-state relations by federal review of state judgments, Congress has recently enacted 28 U.S.C. § 2254(d). This statute makes clear that the Congress regards state courts as trustworthy guardians of federal constitutional rights. Section 2254(d) expresses a preference for litigating constitutional questions in state courts. We urge this Court, consistent with this policy of federal nonintervention, to uphold the "in custody" requirement of section 2241.

The number of petitions for federal habeas corpus ever increases. In 1941, state prisoners filed 134 petitions. By 1965, the number of applications had grown to 4,845. More than 95 percent of these petitions were found to be without merit.[9] Federal prisoners are no less energetic in asserting frivolous claims. See Goodman, *Use and Abuse of the Writ of Habeas Corpus,* 7 F.R.D. 313 (1948). As this burden upon the federal district courts grows to the point where there is insufficient time to ferret out from a mountain of claims, many of them obscurely stated, the relatively few meritorious petitions, the *McNally* doctrine is an increasingly invaluable tool for screening out claims which are invariably frivolous and which may never assume practical significance.

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[9]United States Senate Report No. 1797, Judiciary Committee, Oct. 18, 1966.

The custody requirement of sections 2241 and 2255, as recognized in *McNally, Hayman,* and *Heflin,* expresses a policy of nonjusticiability. It is long-established that this Court, as final arbiter, will, when possible, avoid resolving constitutional dilemmas. See, *e.g., Poe v. Ullman,* 367 U.S. 497 (1960), and *Epton v. New York,* 36 U.S. Law Week 3296 (1968), concurring opinion of Mr. Justice Stewart. The *McNally* doctrine avoids the premature assertion of claims of constitutional error just as the rule of *Parker v. Ellis* forecloses moot claims. In our view, prematurity and mootness are sides of the same coin.

Indeed, the statutory rule requiring that a petitioner be "in custody" closely parallels the constitutional rule confining the adjudicatory power of this Court to actual cases or controversies.[10] In given circumstances the rules may touch. It is doubtful, for example, that a prisoner presents a justiciable case or controversy when he attacks but one of several sentences or attacks a sentence which is to commence in the future.

The claims of Rowe and Thacker may never need to be heard. Before they commence their consecutive sentences they may die, be pardoned, or abandon their claim because they receive parole. The futility of airing premature claims is perhaps best seen in the case of a prisoner who attacks a concurrent sentence which expires on or before the expiration date of a remaining valid sentence. Even if successful he does not win freedom, but remains in prison to serve his

[10]U.S. Const. art. III, § 2.

additional terms. The Fourth Circuit, in *Williams v. Peyton, supra,* suggested that the writ will issue because the mere fact of a conviction impairs the inmate's chances for parole. In our view, there is no warrant for finding in eligibility for parole a satisfaction of the release from custody requirement. Federal courts would then be doing no more than directing states to grant petitioners parole consideration. A prisoner does not alter his own character or remove from his record prior anti-social conduct by demonstrating the constitutional infirmity of one of his convictions. Parole authorities release prisoners on the basis of their present character as it appears in light of their past actions, not on the basis of their legal acumen.[11] Overruling *McNally* would encourage federal and state prisoners to pursue the writ in order to litigate academic questions. An inmate who overturns a sentence in a court which cannot order his release has not gained freedom but has succeeded only in winning an advisory opinion and diverting judicial energies from necessary tasks.

If *McNally* is overruled, the federal district courts will be inundated by a predictable flood of habeas corpus petitions. We have reviewed a cross-section of the records of 36,750 state prisoners and parolees.[12]

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[11]See Comments of Mr. Fred Dickson, Chairman, California Adult Authority, Proceedings of the First Sentencing Institute for Superior Court Judges, 45 Cal.Rptr. Appendix (1965), commencing at page 99.

[12]The study included California's 36,750 adult male felons only. Two separate random samplings of prisoner records were made by the California Bureau of Criminal Statistics. Each sampling consisted of 1,000 records. The similarity of results in both cases indicates a high reliability factor.

Our study reveals that approximately 45 percent are committed under consecutive or concurrent sentences. There is little reason to believe that this percentage would differ substantially in other states or in the federal sphere. Voiding *McNally* would mean that more than 16,000 state prisoners would become eligible to petition for federal habeas corpus in California. While this figure is impressive, conceivably the problem might be greater in other states which, unlike California, have not permitted collateral attack on matters relating to no more than conditions of confinement. Moreover, the persistence regularly displayed by habeas petitioners allows little room for the belief that prior rejection by state courts will discourage a prisoner from renewing his claim in the federal courts.

This Court has taken cognizance of the grave consequences for the administration of justice which attach to the recognition of a new constitutional right. Such consideration increasingly has led to denial of retroactive application of newly acknowledged rights. We do not ask the Court forever to foreclose the constitutional claims of state and federal prisoners. We do urge that, in a time of expanding concepts of due process and equal protection, the continued orderly administration of justice compels reaffirmation of the principle that the writ of habeas corpus lies only to restore immediate freedom. The Great Writ never should become a device by which premature claims are resolved in advisory opinions.

CONCLUSION

For the stated reasons, the People of the State of California respectfully urge that the judgment of the United States Court of Appeals for the Fourth Circuit be reversed.

THOMAS C. LYNCH
Attorney General of the State of California
EDWARD P. O'BRIEN
Deputy Attorney General of the State of California
DERALD E. GRANBERG
Deputy Attorney General of the State of California
CLIFFORD K. THOMPSON, JR.
Deputy Attorney General of the State of California